Filed 10/25/16 In re Alejandro R. CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re ALEJANDRO R., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. ALEJANDRO R., Defendant and Appellant.	F072125 (Super. Ct. No. 13CEJ600526-1V2) **OPINION**

THE COURT[*]

APPEAL from a judgment of the Superior Court of Fresno County. Gregory T. Fain, Judge.

Arthur L. Bowie, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, and Julie A. Hokans, Deputy Attorney General, for Plaintiff and Respondent.

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[*] Before Poochigian, Acting P.J., Franson, J. and McCabe, J.[†]

[†] Judge of the Merced Superior Court assigned by the Chief Justice pursuant to article IV, section 6 of the California Constitution.

The court committed appellant Alejandro R. to the Department of Corrections and Rehabilitation, Division of Juvenile Justice (DJJ) after it found that appellant violated his probation (Welf. & Inst. Code, § 777).

On appeal, appellant contends the court abused its discretion when it committed him to the DJJ because: (1) the evidence does not support its decision to commit him there; and (2) it failed to find that he was a child with exceptional needs and to provide the DJJ with his individualized education program (IEP) before physically delivering him there. We affirm.

FACTS

The Original Wardship Petition

On June 11, 2013, appellant, who was then 15 years old, and another male rode up to Cristian B. on their bicycles, and appellant said, "What's up ene?" Appellant then got off of his bicycle, told Cristian that he liked a chain Cristian was wearing around his neck, and told him that he was not kidding. Cristian became scared and gave appellant the chain because he did not know if appellant was armed and a few months earlier appellant threatened to shoot and kill Cristian's brother. Appellant then told Cristian to give appellant his shoes and Cristian complied. Appellant rode off yelling "Norte." Appellant was arrested the following day at his home but not before he resisted attempts by two officers to handcuff him and take him into custody.

On July 2, 2013, the Fresno County District Attorney filed a first amended petition charging appellant with second degree robbery (count 1/Pen. Code, § 211),[1] misdemeanor resisting arrest (count 2/§ 148, subd. (a)(1)), and a gang enhancement in count 1 (§ 186.22, subd. (b)(1)). At a jurisdictional hearing on that date, the court found the two counts and the enhancement true.

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[1] All further statutory references are to the Penal Code unless otherwise noted.

At a disposition hearing on July 12, 2013, the court set appellant's maximum term of confinement at 15 years 4 months, placed him on probation, and committed him to the New Horizons Program (NHP) at juvenile hall for a period not to exceed one year. Appellant's conditions of probation prohibited him from associating with known gang members, possessing dangerous weapons or illegal controlled substances and required him to obey all laws.

The First Supplemental Petition

On July 23, 2014, appellant completed the NHP and he and his mother met with a Fresno County probation officer, who directed appellant to register as a gang offender pursuant to section 186.30.

On August 30, 2014, appellant and two girls were passengers in car driven by Alfredo Carrillo Gomez when Gomez attempted to avoid a DUI checkpoint by driving in reverse against traffic. After the car was stopped following a brief pursuit, officers found marijuana in plain view, two 24-ounce cans of beer and a 32-ounce bottle of beer in the rear passenger compartment of the car, and approximately one gram of cocaine in a wadded up dollar bill located in its glove compartment. Appellant told the officers that he and Gomez had purchased a gram of cocaine for $40, that appellant contributed $20, and that he snorted some cocaine prior to being contacted by the officers.

On September 24, 2014, a probation officer contacted appellant's mother, who informed the officer that appellant had enrolled in independent studies, but that he did not always attend.

On September 26, 2014, appellant and his mother met with a probation officer, who instructed appellant to enroll at Kings Canyon Continuation School to avoid referral to another educational center. Appellant also reported that he had completed registration pursuant to section 186.30, but he could not provide proof.

On October 2, 2014, an IEP was completed for appellant.

On October 17, 2014, appellant and his mother met with a probation officer at the Reedley Police Department. Appellant initially denied having had any contact with law enforcement but eventually admitted being stopped twice. Appellant's mother reported that he did not always attend school. Appellant claimed he had already registered as a gang offender but again, he did not have any proof. Although he was instructed to obtain proof from the police department before leaving, appellant failed to do so. A drug test that appellant took that day was positive for marijuana.

On October 21, 2014, appellant was contacted by a police officer while in the company of several admitted gang members and affiliates.

On October 23, 2014, appellant and another male were riding bicycles when they were pursued by a police officer for several blocks into an alley. A known gang member yelled out to appellant and the other male as they rode through the alley and then stood in the way of the officer's car, which allowed appellant and the other male to avoid being contacted.

On the afternoon of October 27, 2014, appellant was giving a documented gang member a ride on the handlebars of his bicycle when an officer drove up beside him and activated his emergency lights and siren. Appellant slowed down, which allowed the gang member to jump off the bicycle. Appellant continued riding another 30 feet until the officer got out of his patrol car and ordered him to stop. Prior to being searched, appellant admitted having a hunting knife with a 5.5-inch-long blade in his waistband. While appellant was being booked at the police station, the officer found on appellant's cellular phone a recent photo of appellant with a documented Norteño gang member in which appellant and the gang member were displaying gang hand signs.

On November 18, 2014, the Fresno County Probation Department (probation department) received school records for appellant which showed that appellant failed to attend seven of his weekly independent studies sessions. He also had two incidents at

school where he refused to remove his hat and he left the school prior to meeting with an administrator.

On November 19, 2014, the probation department filed a supplemental petition (Welf. & Inst. Code, § 777) alleging appellant violated his probation because he failed to adhere to his curfew, used narcotics on August 30, 2014, associated with known gang members on four separate occasions, tested positive for marijuana on October 17, 2014, did not attend school, and committed two new law violations, i.e., possession of cocaine (Health & Saf. Code, § 11350, subd. (a)) and possession of a concealed dirk or dagger (§ 21310).

On December 4, 2014, appellant admitted all of the allegations in the petition.

On January 29, 2015, the court recommitted appellant to the NHP for a year.

The Second Supplemental Petition

On April 11, 2015, appellant was involved in a verbal altercation with another minor at the NHP that almost resulted in a fight. During that incident, both minors stood up and squared off in a fighting stance. Appellant ignored an officer's verbal command to "yard check," i.e., to lie face down in a prone position with his hands interlocked behind his head and his feet crossed at his ankles. Appellant had to be sprayed with Oleoresin Capsicum (OC) to get him to comply.

On May 9, 2015, appellant was involved in a gang-related fight with five other minors. During that incident, appellant said something to another minor in a classroom, got up off of his seat, and began punching the minor in the face and head with both fists. Both minors ignored a "yard check" command and three more minors got involved. Appellant had to be sprayed twice with OC before he was subdued.

On May 11, 2015, appellant was placed on a behavior contract because of his noncompliance and disruptive behavior in the program and in his pod. On May 21, 2015, he was returned to his pod from school because of his poor behavior.

On June 7, 2015, appellant was involved in a gang-related fight involving eight minors. As officers dealt with a fight involving two minors from opposing gangs, appellant and several other minors stood up and began fighting each other.

On June 8, 2015, NHP clinicians and counselors requested that appellant be removed from the NHP because of his negative behavior and failure to comply with NHP and juvenile hall rules. In a letter dated June 9, 2015, an NHP clinician and a counselor jointly requested that appellant be removed from the NHP because the program was unable to meet appellant's needs due to his gang issues and for the benefit and safety of other minors in the program. Appellant was subsequently terminated from the program.

On June 9, 2015, the probation department filed a supplemental petition charging appellant with violating his probation by his failure to: (1) maintain appropriate behavior and follow the rules and regulations of the Juvenile Justice Center; (2) comply with the NHP; and (3) refrain from being involved in gang-related physical altercations.

On June 10, 2015, the court revoked appellant's probation.

On June 18, 2015, appellant admitted the allegations that he violated his probation.

On July 16, 2015, pursuant to a defense request, Dr. Harold Seymour performed a psychological evaluation of appellant. Dr. Seymour found that appellant had a general IQ estimate of 64, with a 95% confidence range of between 60 and 72. This placed him in the mild intellectual disability range, which was formerly known as mild mental retardation.

Using the criteria of the Structured Assessment of Violence Risk in Youth (SAVRY), Dr. Seymour classified appellant at a low to moderate risk for recidivism. However, appellant's association with a negative peer group and poor academic achievement were serious risk factors. Dr. Seymour also concluded that appellant did not present an "especially serious risk" for violent reoffense except to the extent that he remained involved with gang members. He opined that appellant needed a placement where he could obtain job skills in a program that worked with young men similar to

appellant and cited the Fresno County Conservation Corps (FCCC) as a placement where this could be accomplished. With respect to a DJJ commitment, Dr. Seymour stated that although it offered "various programmatic and educational options, there remain[ed] a serious risk of continued gang contact."

On July 20, 2015, defense counsel asked the court to continue appellant's disposition hearing, which was scheduled for that date, to allow her time to prepare a statement in mitigation. In granting the request, the court reminded counsel that she had presented appellant's IEP at the January disposition hearing and that she did not need to present it again unless it had been changed or updated.

On August 3, 2015, defense counsel filed a statement in mitigation in which she cited the FCCC as a potential local placement option.

On August 4, 2015, during appellant's disposition hearing, the prosecutor argued that appellant should be committed to the DJJ because there were programs there that would help him and there were no local programs that were less restrictive than the NHP, which he failed. In arguing that appellant's intellectual functioning affected his ability to control his behavior, defense counsel noted that appellant's IEP stated he was deficient in auditory processing, that he understood less than 10 percent of the words and phrases used at his grade level, and that this affected his ability to comply with orders. Additionally, in an apparent reference to a commitment to the FCCC, she argued that a less restrictive, local alternative to a DJJ commitment was available that did not involve incarceration. She also argued against a DJJ commitment because appellant was easily influenced and at DJJ he would be exposed to the "harshest and most sophisticated and most serious" gang offenders.

In committing appellant to the DJJ for a maximum term of six years, the court noted that the DJJ had an extensive gang redirection program, that a high percentage of the minors the court had committed to DJJ obtained a high school diploma there, and that it believed appellant would also be able to earn his diploma. The court also noted that

there were different types of shop activities at the DJJ that were not available locally, as well as educational programs that focused on job skills. The court also believed that appellant would be a "miserable failure" if committed to a local program or a camp program because appellant needed a "stepped-up very much higher level of supervision and accountability." It also noted that appellant had served two commitments to the NHP, the most restrictive commitment available locally.

DISCUSSION

Substantial Evidence Supports the Court's Commitment of Appellant to the DJJ

In making a placement determination, the juvenile court "shall consider, in addition to other relevant and material evidence, (1) the age of the minor, (2) the circumstances and gravity of the offense committed by the minor, and (3) the minor's previous delinquent history." (Welf. & Inst. Code, § 725.5.) Appellate courts review a commitment decision by the juvenile court for an abuse of discretion. All reasonable inferences are indulged to support the juvenile court's decision. (*In re Angela M.* (2003) 111 Cal.App.4th 1392, 1396 (*Angela M.*).) Although a DJJ commitment is usually a placement of last resort, the juvenile court is not required to first exhaust all less restrictive alternatives. (*In re Asean D.* (1993) 14 Cal.App.4th 467, 473; *In re Tyrone O.* (1989) 209 Cal.App.3d 145, 151.) A commitment to the DJJ is not an abuse of the juvenile court's discretion where the evidence demonstrates *a probable benefit to the minor from the commitment and that less restrictive alternatives would be ineffective or inappropriate*. (*In re M.S.* (2009) 174 Cal.App.4th 1241, 1250, italics added.)

Appellant had an extensive history of gang involvement and, despite having successfully completed his first commitment to the NHP on July 23, 2014, he continued his gang activity. On August 30, 2014, approximately five weeks after completing the NHP, he was detained along with a gang member after snorting part of a gram of cocaine that they had just purchased. On October 23, 2014, a gang member assisted appellant in

avoiding being contacted by a police officer. On October 27, 2014, appellant was stopped while giving a gang member a ride on his bicycle's handlebars and found to be carrying a concealed knife in his waistband. While being booked, an officer discovered recent pictures on appellant's cellular phone of appellant and a gang member displaying gang signs with their hands. During his second commitment to the NHP, he was involved in two gang-related fights that ultimately led to appellant being discharged from the program. Additionally, Dr. Seymour concluded that appellant presented a high risk of violently reoffending if he remained involved with gangs. Thus, the record supports the court's finding that appellant would benefit from a commitment to the DJJ because it had an extensive gang redirection program.

Additionally, appellant was diagnosed with borderline intellectual functioning and he had a history of poor school attendance when he was out of custody. Further, Dr. Seymour concluded that appellant needed a placement where he could receive job training, work experience and educational opportunities. Thus, the record also supports the court's conclusion that appellant would benefit from a commitment to the DJJ because it would allow him to participate in educational and vocational classes available there and to earn his high school diploma with the goal of allowing him to become self-sufficient. It is also clear from appellant's failure to attend school, his extensive gang involvement and his numerous violations of probation that appellant would benefit from the discipline and structure inherent in a commitment to the DJJ. Appellant also had substance abuse issues that could be addressed at the DJJ. Thus, the record amply supports the court's finding that appellant would benefit from a commitment there.

Moreover, appellant's numerous probation violations, including his continued association with gang members while out of custody and his failure to register as a gang offender, demonstrated that he was unwilling or unable to comply with the court's orders outside a secure environment. Appellant also continued his gang involvement while in custody in the NHP despite it being a secure, structured program and the most restrictive

available locally. And his violent gang conduct caused him to be a danger to other wards. Thus, the record also supports the court's finding that less restrictive programs would be inappropriate or ineffective.

Appellant contends there is no evidence he would benefit from a DJJ commitment because the court never identified the specific resources, including job training programs, that would be available to appellant at the DJJ and that no evidence was presented that he would receive anything specific to his unique special needs. However, "[t]here is no requirement that the court find exactly how a minor will benefit from being committed to DJJ. The court is only required to find if it is probable a minor will benefit from being committed," (*In re Jonathan T.* (2008) 166 Cal.App.4th 474, 486), which the court did here.

Appellant also contends the record does not support the court's finding that a less restrictive alternative would be inappropriate or ineffective because the court failed to consider numerous possible available placements that are included in the 2012 edition of the Juvenile Placement Manual prepared by the Center on Juvenile and Criminal Justice Sentencing Program. However, "all 'claims involving the trial court's failure to properly make or articulate its discretionary sentencing choices' raised for the first time on appeal are not subject to review." (*People v. Smith* (2001) 24 Cal.4th 849, 852, quoting *People v. Scott* (1994) 9 Cal.4th 331, 353.) This doctrine generally applies to juvenile court proceedings. (*In re Khonsavanh S.* (1998) 67 Cal.App.4th 532, 536-537.) Appellant did not object to the juvenile court's alleged failure to consider these placements. Thus, assuming the court did not consider any of these placements, as appellant alleges, he forfeited this issue by his failure to object in the juvenile court.

In any event, appellant does not explain why any of these programs would have been an appropriate placement for him in light of his need for a highly secure and structured setting because of his extensive gang involvement, his inability to obey the court's orders outside of such an environment, and the danger he posed to other wards.

Thus, we conclude that the record supports the court's findings that appellant would benefit from a DJJ commitment and that less restrictive alternatives would be ineffective or inappropriate.

The Issues Involving Appellant's Educational Needs

During the disposition hearing the court stated:

> "I think he's somebody with exceptional needs. However, as probation has stated, I don't think that we have a determination. So educational records do not indicate that a determination has been made that he is somebody with exceptional – individual with exceptional needs. I think he is, and I think that they ought to have him have further analysis of that when he gets there at DJJ for his educational needs."

Appellant cites *Angela M., supra,* 111 Cal.App.4th 1392 to contend the court abused its discretion in committing him to the DJJ without making a finding that he was a child with "exceptional needs" and by delivering him to the DJJ without first providing the DJJ with a copy of his IEP, and that this requires reversal of the judgment. We disagree.

Statutory and Regulatory Background

Education Code section 56000 declares that "all individuals with exceptional needs have a right to participate in free appropriate public education," and states, "It is the further intent of the Legislature to ensure that all individuals with exceptional needs are provided their rights to appropriate programs and services which are designed to meet their unique needs under the federal Individuals with Disabilities Education Act (20 U.S.C.S. Sec. 1400 et seq.)." "Individuals with exceptional needs" means those persons who meet each of the several requirements enumerated in section 56026, including, as relevant here, that such persons be "[i]dentified by an individualized education program team as a child with a disability, as that phrase is defined in [the specified portion] of the United States Code" (Ed. Code, § 56026, subd. (a)), and that "[t]heir impairment, as described in [Education Code section 56026,] subdivision (a),

requires instruction and services, which cannot be provided with modification of the regular school program." (Ed. Code, § 56026, subd. (b).) "[P]upils whose educational needs are due primarily to limited English proficiency; a lack of instruction in reading or mathematics; temporary physical disabilities; social maladjustment; or environmental, cultural, or economic factors are not individuals with exceptional needs." (Ed. Code, § 56026, subd. (e).)

Education Code section 56001 provides that "It is the intent of the Legislature that special education programs provide all of the following: [¶] … [¶] (e) Each individual with exceptional needs shall have his or her educational goals, objectives, and special education and related services specified in a written [IEP]." An IEP is a written statement for children with a disability that includes, among other information, (1) a statement of the child's present levels of educational performance, including how the child's disability affects the child's participation and progress in the curriculum; (2) a statement of measurable annual goals, including benchmarks or short-term objectives for meeting the child's educational needs; (3) a statement of the special educational and related services the child will receive; and (4) an explanation of the extent to which the child will not participate in regular education programs. (20 U.S.C.S. § 1414(d)(1)(A)(i).) When a child has an IEP and the juvenile court orders the child committed to DJJ, the child cannot be conveyed to DJJ until the IEP has been furnished to DJJ. (Welf. & Inst. Code, § 1742.)

Analysis

In *Angela M.*, the minor, Angela, admitted violating probation granted following a prior wardship adjudication, and the juvenile court ordered her committed to the California Youth Authority (CYA). However, the court-appointed psychologist who examined Angela recommended placement and treatment in a psychiatric/treatment-based facility. He opined that Angela was suffering from bipolar disorder and appeared to exhibit symptoms of attention deficit hyperactivity disorder (ADHD). He also

recommended that Angela have an IEP, that is, that she be evaluated by education professionals to determine whether she had special educational needs. (*Id*. at p. 1398-1399.) The appellate court stated, based on this evidence, that the juvenile court "was clearly on notice that Angela may have special educational needs." (*Id*. at p. 1398.)

The *Angela M.* court noted that the version of California Rules of Court, rule 1493(e)(5)[2] in effect at that time implemented the legislative mandate to provide free special education services to all eligible children by directing that the juvenile court must consider the educational needs of the child when declaring a child a ward of the court. (*Angela M., supra*, 111 Cal.App.4th at p. 1398, fns. omitted.) The court held: "Although the record indicates special attention to Angela's education needs was appropriate, the juvenile court did not mention this issue when committing her to CYA. Remand is necessary to permit the juvenile court to make proper findings, on a more fully developed record, regarding Angela's educational needs." (*Id*. at p. 1399, fn. omitted.) Specifically, the court ordered that on remand, the juvenile court was to determine whether an evaluation of Angela's special educational needs should be conducted. (*Id*. at p. 1399.)

The decision in *Angela M.* was based on former rule 1493, which was amended and renumbered rule 5.790 and now only requires the court to "consider whether it is necessary to limit the rights of the parent or guardian to make educational or developmental-services decisions for the child…." (Rule 5.790(h)(5)). Thus, *Angela H.* is inapposite because the decision in that case was based on a rule that no longer exists.

However, even if *Angela M.* were still good law, that case stands for the simple proposition that prior to committing a juvenile to CYA, the juvenile court has a duty to consider or determine whether the juvenile has special educational needs. (*In re Angela M., supra,* 111 Cal.App.4th at p. 1398.) In *Angela M.*, the court appeared completely unaware of this duty. Here, by contrast, appellant had an IEP that had been prepared for

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2 Rule references are to the California Rules of Court.

him on October 2, 2014, although at the time the court made the comments quoted above it did not recall that he did. Nevertheless, it is clear from the record the court was aware of appellant's special needs and that it considered them in committing him to the DJJ.

Moreover, Welfare and Institutions Code section 1120, subdivision (b), requires the DJJ to "assess the educational needs of each ward upon commitment and at least annually thereafter until released on parole," and that the assessment include a determination as to the appropriate educational program for the ward. Thus, any error in the court's failure to specifically find that he was a child with exceptional needs or to provide the DJJ with appellant's IEP prior to physically ordering him confined there was harmless because he would be evaluated to determine his educational needs once he was delivered there. Thus, we conclude that the court did not abuse its discretion when it committed appellant to the DJJ.

DISPOSITION

The judgment is affirmed.